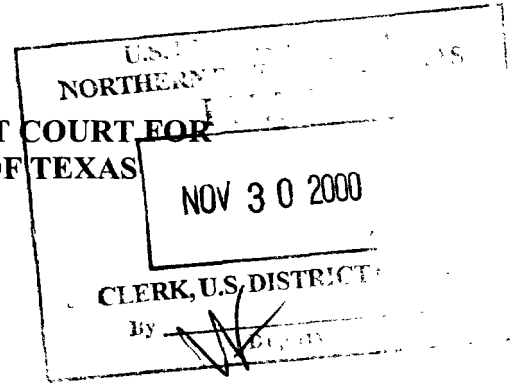


ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



STEPHEN B. JONES, LINDA D.
LYDIA and CAROLINE FRANCO,
as Texas registered voters,

Plaintiffs,

v.

GOVERNOR GEORGE W. BUSH
AND RICHARD B. CHENEY, as
candidates for President and Vice
President of the United States of America; and
ERNEST ANGELO, GAYLE WEST,
BETTY R. HINES, JAMES B. RANDALL,
HELEN QUIRAM, HENRY W. TEICH, JR.,
WILLIAM EARL JUETT, HALLY B.
CLEMENTS, HOWARD PEBLEY, JR.,
ADAIR MARGO, TOM F. WARD, JR.,
CARMEN P. CASTILLO, CHUCK JONES,
MICHAEL PADDIE, JAMES DAVIDSON
WALKER, JOSEPH I. O'NEIL, III,
BETSY LAKE, ROBERT J. PEDEN,
JIM HAMLIN, MARY E. COWART,
SUE DANIEL, JAMES R. BATSELL,
LOYCE MCCARTER, MICHAEL DUGAS,
NEAL J. KATZ, MARY CEVERHA,
CLYDE MOODY SIEBMAN, RANDALL TYE
THOMAS, CRUZ G. HERNANDEZ,
JOHN ABNEY CULBERSON, STAN STANART,
AND KEN CLARK, Texas Electors,

Defendants.

CIVIL ACTION NUMBER
3:00-CV2543-D

**RESPONSE AND BRIEF OF DEFENDANTS GOVERNOR
GEORGE W. BUSH AND RICHARD B. CHENEY IN OPPOSITION
TO PLAINTIFFS' PRELIMINARY INJUNCTION APPLICATION**

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Governor George W. Bush (“Governor Bush”) and Richard B. Cheney (“Mr. Cheney”) respectfully request that the Court deny Plaintiffs’ Application for a Preliminary Injunction (“Application”) on the following grounds:

INTRODUCTION

In October 1995, defendant Richard B. Cheney moved from his home state of Wyoming to Texas to accept a job as the chief executive officer of the Halliburton Corporation. He left that job in August 2000, put his Dallas home up for sale,¹ and returned to Wyoming where he was reared, schooled, married and elected to Congress six consecutive times. In the same month, Mr. Cheney accepted the nomination of the Republican Party to run for the office of Vice President of the United States.

On November 7, the citizens of Texas overwhelmingly endorsed Mr. Cheney’s candidacy and elected thirty-two state electors pledged to the Bush-Cheney ticket for national office. Plaintiffs now seek to bar those electors from honoring the will of the people. Their suit asks the Court for an extraordinary and unprecedented injunction: the electors are to be prohibited from voting for either Mr. Bush or Mr. Cheney on the grounds that Mr. Cheney may be an inhabitant of Texas when the Electoral College meets in December 2000.

The Court should deny the requested relief. First, plaintiffs lack standing to bring their political grievances before this Court. Second, this Court lacks the power to hear the complaint. It belongs in the halls of Congress – not before an Article III court. Third, the claim lacks all merit. Mr. Cheney is not a Texas inhabitant. He does not reside in the state. He does not own a home in the state. He does not work in the state. He does not, and cannot, vote in the state. And

¹ The home, a house in Highland Park, Texas, has since been sold. A 7. Mr. Cheney accordingly holds no real property interests in the state of Texas.

plaintiffs offer no evidence even to suggest that these defining characteristics will be any different on December 18, 2000, the date when the electors will meet to cast their ballots for President and Vice President of the United States. Accordingly, plaintiffs' attempt to disenfranchise the citizens of Texas should be rejected. The motion for a preliminary injunction should be denied, and the complaint should be dismissed.

FACTS

Defendant Richard B. Cheney was raised, married, and educated in Wyoming. He and his wife have maintained a residence in the state for the past twenty-three years. On six consecutive occasions, he was elected to serve as Wyoming's sole representative in the House of Representatives. And after a long-tenure of public service in Washington, including three years as this country's Secretary of Defense, he and his wife returned in 1993 to take up residence in Jackson Hole.²

In October 1995, Mr. Cheney moved to Dallas, Texas to become the Chief Executive Officer of Halliburton Corporation. He retired from that post in August of this year to accept his party's vice presidential nomination. He declared his intention to, once again, return to Wyoming, placed his Highland Park house on the market, and cancelled both his Texas voter registration and driver's license. A 18, 21, 7, 11, 3. The house has since been sold.³

² Defendants respectfully request that the Court take judicial notice of these facts, which are not in dispute and which are widely known. *See, e.g.*, <<http://www.georgewbush.com/bushcheney/dicklynne/dcbiography.html>>; CBS This Morning, Interview with Richard Cheney (Jan. 29, 1993) ("we've bought a home in Wyoming, which is our home state").

³ Plaintiffs make much of the fact that Mr. Cheney has yet to file a notice with the County stating that he may no longer be eligible to claim a homestead exemption. *See* Plaintiffs' Brief in Support of Their Application for Preliminary Injunction ("Pltfs' Br.") at 8. However, pursuant to V.T.C.A. Tax Code § 11.43(g) of the Texas Code, no such notice is required to be filed until May 2001.

At the same time Mr. Cheney was winding up his affairs in Dallas, he re-registered back home with the Wyoming authorities. On July 21, 2000, Mr. Cheney presented himself to the Teton County Clerk⁴, and applied to register to vote. A 2. The County Clerk determined that Mr. Cheney was a “bona fide resident” of Teton County Wyoming under Wyoming law – that is, he had a current habitation and it was the place to which Mr. Cheney intended to return whenever he is absent – and registered Mr. Cheney to vote in Wyoming. A 2. Mr. Cheney subsequently voted in two elections in Teton County. A 18.

On the same day as he registered to vote in Wyoming, Mr. Cheney applied for and received a Wyoming driver’s license. A 19, 13. At the time he received that license, his Texas driver’s license was invalidated and perforated with the word “VOID.” Mr. Cheney’s Wyoming license is the only valid license he currently possesses. *Id.*

Following his announcement that he would accept the Republican party’s nomination for Vice President of the United States, the United States Secret Service requested Mr. Cheney to designate his primary residence for purposes of Secret Service protection. Mr. Cheney designated his home in Jackson Hole, Wyoming – not Dallas, Texas – as his primary residence. A 18.

LEGAL STANDARD

The “extraordinary remedy” of a preliminary injunction demands that the plaintiffs “clearly carry the burden of persuasion on all four *Callaway* prerequisites.” *Cherokee Pump & Equip., Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994) (quotation omitted) (following *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

⁴ Under Wyoming Law, the Teton County Clerk is the Chief Elections Officer for Teton County, Wyoming. A 1.

First, the movant must establish a substantial likelihood of success on the merits. Second, there must be a substantial threat of irreparable injury if the injunction is not granted. Third, the threatened injury *to the plaintiff* must outweigh the threatened injury to the defendant. Fourth, the granting of the preliminary injunction must not disserve the public interest.

38 F.3d at 249 (emphasis added).

A court's decision to grant a preliminary injunction must be "the exception rather than the rule." *Id.* (quotation omitted). Plaintiffs' burden is, therefore, a "heavy one." *Lockheed Martin Corp. v. Raytheon Co.*, 42 F. Supp. 2d 632, 634 (N.D. Tex. 1999). Indeed, to the extent that Plaintiffs are seeking not to maintain the status quo, but rather to change it, they are seeking a mandatory injunction which requires an even greater showing on the *Calloway* factors. *Justin Indus., Inc. v. Choctaw Sec., L.P.*, 747 F. Supp. 1218, 1220 n.5 (N.D. Tex. 1990) ("mandatory injunctions are even less favored than prohibitory injunctions since they compel a person to act rather than simply maintain the status quo"), *aff'd and remanded*, 920 F.2d 262, 268 n.7 (5th Cir. 1991) ("And because Sutherland is seeking a mandatory injunction, it bears the burden of showing a clear entitlement to the relief under the facts and the law.") Here, plaintiffs have wholly failed to meet the burden of proof necessary to obtain the truly extraordinary relief they seek in this case.

ARGUMENT

I. PLAINTIFFS ARE NOT LIKELY TO PREVAIL ON THE MERITS.

A. Plaintiffs Do Not Have The Requisite Standing.

1. Plaintiffs Lack Article III Standing.

A private citizen must, among other things, suffer a concrete and particularized injury in order to have standing to sue. A claim of harm to every citizen's interest in the proper application of the Constitution and laws will not suffice. *See, e.g., Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1987); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

The Supreme Court’s longstanding principle of requiring a concrete injury is “particularly applicable here, where” plaintiffs “seek an interpretation of a constitutional provision which has never before been construed by the federal courts.” *Schlesinger*, 418 U.S. at 221. In this case, plaintiffs have only alleged an injury to the “national interest” and to the rights of “all” American citizens, which simply is not sufficient to give them standing to sue.

2. Plaintiffs’ Belated Assertion That Federal Jurisdiction Exists to Redress Unlawful “State Action” Is Meritless.

Confronted with the absence of concrete injury to themselves as individual voters, and unable to identify rights of individual citizens secured by the Twelfth Amendment, plaintiffs adopt a new theory. They contend that “the conduct of presidential electors in voting for President and Vice President constitutes state action,” Pltfs’ Br. at 2, and that “[a]ll citizens have standing to challenge the constitutionality of state action.” *Id.*⁵

⁵ Plaintiffs’ claim of direct injury rests on a misconceived analogy of the Twelfth Amendment to the First Amendment. (“This direct injury as a direct result of the threatened violation of the Twelfth Amendment is analogous to the injury threatened by the violation of a person’s First Amendment rights to free speech.”) Pltfs’ Br. a 4. Of course, the Twelfth Amendment provision at issue (taken over in whole from original Article II, section 3) is a structural provision of the Constitution governing an aspect of the relations between the several states and the federal government. It is wholly unlike the First Amendment which is part of the Bill of Rights and confers specific protections upon individual citizens. Under Plaintiffs’ theory, therefore, any voter would have Article III standing to sue any elected official to compel him or her to comply with the Constitution in carrying out the duties of his or her office. This theory has been soundly rejected by the Supreme Court. *See generally Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974) (finding no standing of citizens to sue to compel the Executive Branch to act in conformity with the Incompatibility Clause of the Constitution). Plaintiffs’ claimed “right” is, in reality, no more than a “generally available grievance about government—claiming only harm to his and every citizen’s interest in proper

First, plaintiffs' Emergency Amended Complaint did not allege "state action" as a ground for this Court's jurisdiction or otherwise invoke 28 U.S.C. § 1343(3) to challenge "deprivation under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States." In fact, there has not been, and even under plaintiffs' theory there will not be, a deprivation "under color of state law." When the Texas electors vote for President and Vice President, they are not performing a state law function. "While presidential electors are not officers or agents of the federal government (*In re Green*, 134 U.S. 377, 379 (1890), 10 S. Ct. 586, 33 L.Ed. 951), they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Burroughs v. United States*, 290 U.S. 534, 545 (1934). For that reason, this is not a "state action" case and there is no "state action" standing.⁶

Second, even if the Texas electors' anticipated action were "under color of State law," such actions would not deprive plaintiffs of any "right, privilege or immunity secured by the Constitution." Neither Article II, section 3, nor the Twelfth Amendment creates any "right, privileges or immunities" that can be vindicated by individual voters. *See Maxey v. Washington State Democratic Committee*, 319 F. Supp. 673, 679 (W.D. Wash. 1970); *see also Gray v. Sanders*, 372 U.S. 368, 377 n.8 (1963).

application of the Constitution and laws." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

⁶ The cases cited by plaintiffs, *Laird v. Tatum*, 408 U.S. 1, 13 (1972), and *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979), simply do not stand for the proposition "that all citizens have standing to challenge the constitutionality of state action when they are threatened with injury as a result of that action." Pltfs Br. at 2.

3. Plaintiffs Do Not Have Standing By Proxy

Plaintiffs try to assert a novel proposition of “standing by proxy.” Citing three election cases, plaintiffs assert that “voters have standing to challenge the constitutionality of state actions that directly impact the candidates for public office.” Pltfs’ response at 3. Based on this proposition, they conclude that they have standing to sue on behalf of the nondefendant candidates. *Id.* None of the cited cases, however, supports this broad proposition of constitutional standing.

Indeed, the cases do not address standing at all. The language Plaintiffs cite to support their standing argument (“laws that affect candidates always have at least some theoretical, correlative effect on voters”) was used by the courts not in the context of any standing determination, but rather to determine whether the laws at issue were subject to close scrutiny. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972); *Henderson v. Fort Worth Independent School District*, 526 F.2d 286, 291 (5th Cir. 1976). Moreover, the cases involved voters seeking to have a candidate placed on the ballot in order that they might be able to cast their votes for that candidate. *See Anderson*, 460 U.S. at 782-83; *Bullock*, 405 U.S. at 136; *Henderson*, 526 F.2d at 288. If the voters had standing at all, it was not standing “to protect the interests” of the candidates, but rather to protect their own First Amendment rights to cast their votes for a candidate of their choice. That situation is markedly different from the case here, where plaintiffs all had the opportunity to cast their votes for their candidates of choice.

B. Plaintiffs’ Claim Is Barred Under The Political Question Doctrine.

Defendants’ motion to dismiss argued that the complaint presented a nonjusticiable political question for several reasons. Among these is the fact that the Constitution committed the issue presented here to Congress, a coordinate branch of government.

Baker v. Carr, 369 U.S. 186, 217 (1962). See also *Nixon v. United States*, 506 U.S. 224, 228-29 (1993). That commitment to Congress, defendants submit, appears in the Twelfth Amendment's requirement that "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and then the votes shall be counted." U.S. CONST. amend. XII.

Plaintiffs' response says that they are not "attempt[ing] to prevent Congress from counting electoral votes" for Governor Bush and Secretary Cheney, but rather that they are entitled to a judicial determination that the candidate defendants are "constitutionally ineligible to receive" them. [Plaintiffs' Opposition to Motion to Dismiss ("Pltfs' Response") at 5.] Pltfs' Br. at 5. Relying upon *Powell v. McCormack*, 395 U.S. 486 (1969), plaintiffs assert that a textually demonstrable constitutional commitment of an issue to a coordinate branch of government must be shown in an especially "strict manner." Pltfs' Response at 5. There is no support for this "strict manner" requirement in *Powell*. In *Powell*, Speaker of the House McCormack posed a political-question objection to Article III jurisdiction based upon the Qualifications-Clause of the Constitution under which, McCormack asserted, the House of Representatives possessed the exclusive power to determine the qualifications of its members. Reviewing that asserted jurisdictional bar, the Court found that it needed to ask both "whether there was a "textually demonstrable constitutional commitment of the issue"" to Congress and also "what is the scope of such commitment." No especially "strict" showing was required by *Powell*.

Indeed, this Court should ask the same questions asked in *Powell*. Here there is plainly a commitment of the obligation to count electoral votes to Congress. See U.S. CONST. amend. XII. The question then is whether Congress's obligation to count the electoral votes

comprises the power to reject them if they are unlawful. For if Congress has that power, the judicial review sought by plaintiffs would be a forbidden encroachment.

Part of the answer is provided by the Electoral Count Act, 3 U.S.C. §§ 1-18, by which Congress (1) provided a comprehensive statutory scheme allowing members of Congress to object to electoral votes and (2) specified the procedure by which Congress shall determine whether the votes will be counted. Under the Act, Congress may ultimately reject challenged votes if the House and Senate “concurrently agree that such vote or votes have not been so regularly given by electors.” *Id.* Indeed, Section 15 *requires* the President of the Senate to call for objections to the Electoral College vote and *requires* Congress to receive and consider “objections made to any vote . . . from a State.” 3 U.S.C. § 15. The Electoral Count Act plainly reflects Congress’s belief that it possesses the constitutional authority to adjudicate objections to electoral votes.

Plaintiffs’ reliance on *Ray v. Blair*, 343 U.S. 214 (1952), is wholly misplaced. Plaintiffs point out that, after *Blair*, “bodies other than Congress may regulate how a presidential elector may vote,” Pltfs’ Response at 7. That holding, affecting state political parties and rooted in the Twelfth Amendment and long-established tradition, offers no support for the quite different conclusion that the federal courts have a general power to review electoral votes for compliance with the Constitution and to conduct that review before or concurrently with the counting of the votes in Congress.

Plaintiffs cannot circumvent Congress’s authority to decide which votes count by recharacterizing their request to this Court as a challenge to the “eligibility” of Governor Bush and Mr. Cheney to “receive” votes. No matter how they say it, plaintiffs are asking this court to

decide that the Texas electors' votes will not be counted by Congress. Such a request for judicial intervention clearly violates the political question doctrine.

**C. Mr. Cheney's Inhabitation Is Measured As Of December 18, 2000
And Not Before.**

The U.S. Constitution's Twelfth Amendment provides in relevant part that:

The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President

U.S. CONST. amend. XII. The language of the Amendment is clear: at least one of the candidates "shall not be an inhabitant of the same state" as the electors on the date that "the Electors shall meet . . . and vote by ballot." Pursuant to federal statute, the "electors of President and Vice President of each state shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment." 3 U.S.C. § 7. This year that date is December 18, 2000. It follows that the relevant date for assessing the inhabitation of the Presidential and Vice Presidential candidates is December 18, 2000.

The grammar and logic of the Twelfth Amendment's inhabitation requirement ties that requirement temporally to the election to office of the Presidency and Vice Presidency. In that respect it parallels the Constitution's other inhabitation requirements relating to membership in the U.S. Senate and House of Representatives.⁷ The Framers made inhabitation at the time of election to office the relevant time.

⁷ Cf. U.S. Const. art. I, § 2, cl.2 ("No person shall be a Representative who . . . shall not, when elected, be an Inhabitant of the State in which he shall be chosen." U.S. CONST. art. I, § 3, cl.3 ("No person shall be a Senator who . . . shall not, when elected, be an Inhabitant of that State for which he shall be chosen.")).

The notion that the candidates' inhabitance must be assessed as of the date of the general election (November 7, 2000) will not hold water. First, the Constitution cannot be read to measure inhabitance on the date of the general election because the Constitution *nowhere mentions* a general election for President and Vice President. The only election for President and Vice President contemplated by the Constitution is the election conducted when the "Electors . . . meet in their respective states and vote by ballot for President and Vice President." U.S. CONST. amend. XII. Second, plaintiffs' proposed measurement date is at odds with federal law: the general election date is not the date on which "the electors . . . give their votes"; rather, it is the date upon which "the electors of President and Vice President shall be appointed in each state." 3 U.S.C. § 1. *Compare* 3 U.S.C. § 7 (the "electors of President and Vice President of each state shall meet and *give their votes*" on December 18, 2000 (emphasis added)). The appointment of electors by the individual states is an act necessarily distinct from the selection of the President and Vice President by those electors and, of course, it must occur prior to the electoral college balloting. Nor does plaintiffs' suggestion that inhabitance may be assessed at the time of a candidate's selection or nomination (or at some other date before the popular vote) make sense. In addition to being inconsistent with the amendment's plain language, the proposal suffers from a logical flaw: the Constitution cannot disable a state's electors from choosing two fellow inhabitants at a point prior to the time at which such electors are actually chosen. There simply are no electors even potentially subject to the disability until after the general election.

D. Mr. Cheney Is An Inhabitant Of Wyoming, Not Texas.

The Twelfth Amendment to the Constitution of the United States, which amended U.S. CONST. art. II, § 1, provides that:

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves[.]

U.S. CONST. amend. XII. Plaintiffs contend that this Court should equate the Twelfth Amendment's inhabitance requirement with the common law definition of "domiciliary," and that under such a definition, Mr. Cheney cannot demonstrate that he changed his domicile to Wyoming. Plaintiffs' argument fails because the undisputed facts reveal that Mr. Cheney has reestablished his already significant ties with the State of Wyoming and has reestablished a domicile in that State.

The Supreme Court has not construed the meaning of the constitutional term "inhabitant" as used in the Twelfth Amendment, but the Framers have provided modest, but clear, guidance that the term should be interpreted broadly. *See Lake County v. Rollins*, 130 U.S. 662, 670 (1889) (the relevance of the framers' intent); *see also Schaefer v. Townsend*, 215 F.3d 1031, 1036 n.5 (9th Cir. 2000), *petition for cert. filed* (U.S. Oct. 26, 2000 (No. 00-675) (noting that Roger Sherman (Connecticut) moved to strike the original word, "resident," and replace it with "inhabitant, reasoning that the latter term was "less liable to misconstruction").⁸

In the related context of congressional residence qualifications, for example, the Constitution sets forth the requirements for membership in the United States House of Representatives: "No Person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2 (emphasis added). The Framers deliberately selected the word "inhabitant" to replace the original word, "resident," *see Schaefer*, 215 F.3d at 1036 n.5 (quotation omitted), because the former "would not exclude persons absent occasionally for a considerable time on public or private business."

⁸ We do not dispute plaintiffs' contention that the constitutional term "inhabitant" must be defined as a matter of federal common law, rather than on the law of any particular state. *See* Pltfs' Br. At 4.

Id. (quotation omitted). By selecting the word “inhabitant,” therefore, the Framers aimed to include even those who spent a significant amount of time outside of the “State.”

The Supreme Court’s decision in *Franklin v. Massachusetts*, 505 U.S. 788, 791 (1992), buttresses the notion that “inhabitation,” in this context, has broad connotations. The appellees in *Franklin* complained that the Secretary of Commerce (“the Secretary”) impermissibly allocated overseas federal employees to their home states for purposes of the 1990 census and Congressional reapportionment.⁹ *See id.* at 803. They argued that the allocation of a certain number of Representatives per State required “actual Enumeration” – a count of the persons actually “in” each State. *See id.* (emphasis added). And because the first census (conducted in 1790) required that persons be allocated to their place of “usual residence,” appellees argued that the Secretary should have allocated overseas personnel to their overseas stations, because those were their usual residences. *See id.* at 803-04.

The *Franklin* Court reasoned that while the phrase “usual residence” can mean “more than mere physical presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place,” the first enumeration Act provided for residents who were occasionally absent from their usual residences, and the Act placed no limit on the duration of the absence. *Id.* at 804. The first enumeration Act described the required tie to the State by using several words and phrases, including “usual place of abode” and “inhabitant.” *See id.* The Court then analogized to the “related context” of congressional residence qualifications, noting that the Framers interpreted the term “inhabitant” to have a broad and inclusive meaning. *See id.*

⁹ The Constitution provides that Representatives “shall be apportioned among the several States . . . according to their respective Numbers,” which requires, by virtue of § 2 of the Fourteenth Amendment, “counting the whole number of persons in each State.” U.S. CONST. art. I, § 2, cl. 3.

at 805. The phrase “usual residence,” the Court concluded, has similarly “broad connotations.” *Id.* The Secretary’s judgment, then, that many federal employees temporarily stationed overseas had “retained their ties to the States” and should be counted toward their States’ representation in Congress was “consonant with, though not dictated by, the text and history of the Constitution.” *Id.* at 806 (emphasis added).¹⁰

This history and Supreme Court jurisprudence suggest that, for Twelfth Amendment purposes, an inhabitant is one who has established significant ties to a particular State. The next inquiry, of course, is how a court evaluates whether an individual has established the required ties to a State. Plaintiffs claim that the definition of “inhabitant” that is “most likely to correspond to the framers’ intent,” is to equate inhabitant with “domiciliary,” but they cite no authority to support this notion. Both law and history reflect that the common law requirements of a domicile are more rigorous than those appropriate for “inhabitation.” *See, e.g., Zambrino v. Galveston, H. & S.A. Ry. Co.*, 38 F. 449, 452-53 (C.C.W.D.Tex. 1889) (“Citizenship and residence are not synonymous terms, although resident and inhabitant are usually so regarded, and while a person may be said to have but one domicile, he may have several residences.” (internal citations and quotation marks omitted)); 2 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW § 9.1 (3d ed. 1999) (noting that “[a]n ‘inhabitant of that State’ as used in article I, § 2, cl.3 and § 3, cl.3, has been taken to mean a resident”) (citing E.S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 10 (14th ed. 1978)); *cf. Franklin*, 505 U.S. at 804-05 (comparing the constitutional term “inhabitant” to “usual resident”). Nevertheless, Mr. Cheney’s actions satisfy even the higher domicile standard.

¹⁰ The Secretary noted the employees’ subjective belief of the location of their usual residence. *See Franklin*, 505 U.S. at 806. (“Many, if not most, of these military [personnel] overseas consider themselves to be usual residents of the United States.”).

Mr. Cheney expressed his intent to abandon his domicile in Texas and to become a domiciliary of Wyoming, and his actions achieved both objectives. A change in domicile typically requires “only the concurrence of: (1) physical presence at the new location and (2) an intention to remain there indefinitely . . . or . . . the absence of any intention to go elsewhere.” *Coury v. Prot*, 85 F.3d 244, 250 (5th Cir. 1996). To determine a person’s domicile, a court must address a variety of factors, none of which is determinative. *See id.* at 251. Specifically, “[t]he court should look to all evidence shedding light on the litigant’s intention to establish domicile. The factors may include the places where the litigant exercises civil and political rights . . . owns real and personal property, has driver’s and other licenses . . . and maintains a home for his family.” *Id.*¹¹

Since July 21, 2000, Mr. Cheney has declared his intent to make Wyoming his primary place of residence, registered to vote in Wyoming, voted in Wyoming, obtained a Wyoming driver’s license, listed and sold his house in Texas, listed his Wyoming house as his primary place of residence for the United States Secret Service, and retired from his employment at the Halliburton Corporation in Dallas, Texas. Mr. Cheney’s actions have been consonant with his expressed intent to move back to Wyoming and, in effect, establish a domicile there.

Plaintiffs do not dispute these facts. Instead, they seek to dilute their legal significance by arguing first that Mr. Cheney’s ties to Texas continue to sustain his domicile there and, second, that Mr. Cheney never intended to remain in Wyoming indefinitely, but

¹¹ Relying on the First Circuit’s decision in *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), plaintiffs characterize a change of voter registration or driver’s license as a “political privilege” that bears little or no weight in determining inhabitancy. *See* Pltfs’ Br. At 5 (citing [Case of] Bailey (1824)). This argument directly contravenes the Fifth Circuit’s adoption of certain factors for determining domicile, *see Coury*, 85 F.3d at 251, which the plaintiffs have equated to the inhabitance required by the Twelfth Amendment.

instead intended to go directly to Washington, D.C. Both arguments fail as a matter of law. In their first argument, plaintiffs assert that Mr. Cheney's voter registration, driver's license, and place of employment, *inter alia*, all suggest that he is a resident of Texas. As previously noted, however, Mr. Cheney has changed his voter registration, replaced his driver's license, and left his place of employment. Nevertheless, plaintiffs assign no weight to these same factors when they relate to the State of Wyoming. Plaintiffs cannot contend that the selfsame factors, approved by the courts for evaluation of a person's domicile, have legal significance in Texas but not in Wyoming.

Plaintiffs' second claim is equally perplexing and unpersuasive. They claim that because Mr. Cheney changed his domicile in order to run for Vice President of the United States, he could not possibly have intended to "remain in Wyoming permanently and indefinitely." *See* Pltfs' Br. at 9. This argument bears at least two problems. First, it suggests that an individual seeking to establish domicile in a State must intend to abide there without ever leaving the State. The applicable standard is not so impracticable: once a person has established domicile, that domicile persists until a new one is acquired or it is clearly abandoned. *See Coury*, 85 F.3d at 250. On the plaintiffs' theory, however, a business traveler could conceivably establish and abandon and reestablish a domicile two or three times per week. The common law doctrine of domicile does not rest on such vagaries.

Second, plaintiffs' argument directly contravenes the Framers' intention that the word "inhabitant" include those who leave their States for considerable periods of time on public business. *See Schaefer*, 215 F.3d at 1036 n.5. It is, of course, true that Mr. Cheney reestablished his domicile in Wyoming soon before his nomination as a candidate for Vice President. Mr. Cheney knew, at the time he changed his domicile, that, if elected, he would spend most of

his time in Washington, D.C. That time, however, would constitute “public business,” and, as explained above with respect to congressional residence qualifications, the Framers used the word “inhabitant” specifically to include “persons absent occasionally for a considerable time on public or private business.” *Id.* (internal citations omitted). To accept plaintiffs’ construction of domiciliary intent, then, would be to conclude that the vast majority of the Members of Congress are violating Article I, Section 2 of the Constitution and that the Framers’ intentions with respect to the Twelfth Amendment can never be achieved.¹² *See, e.g., Franklin*, 505 U.S. at 805 (where House Committee of Elections found that a Representative who was elected while living in Spain, serving as a minister plenipotentiary from the United States, was still an inhabitant of Georgia, one Representative noted that “if the mere living in a place constituted inhabitancy, it would exclude sitting members of this House” (internal quotation marks and citations omitted)). Constitutional history, the common law, and common sense dictate against such a result.

II. PLAINTIFFS HAVE NOT PROVEN A SUBSTANTIAL THREAT OF IRREPARABLE HARM.

Plaintiffs have made no attempt to offer any evidence of a concrete or particularized harm *they* will suffer if their request for an injunction is denied. Rather, they rely solely on the fact that absent the injunction, it is “highly likely that the defendant Electors will

¹² Mr. Cheney is presently in the Washington, D.C. metropolitan area to fulfill his public duties. His presence in Washington for extended periods of time is precisely analogous to the presence of all Members of Congress in Washington for considerable periods of time. *Cf. Franklin*, 505 U.S. at 805. That Mr. Cheney’s public business requires him to be in Washington, rather than Wyoming, cannot coerce the abandonment of his domicile in Wyoming. *Cf. 4 U.S.C. § 113(a)* (2000) (“No State . . . in which a Member of Congress maintains a place of abode for purposes of attending sessions of Congress may, for purposes of any income tax . . . treat such Member as a resident or domiciliary of such State.”).

Interestingly, plaintiffs’ arguments would suggest that the Electors from the District of Columbia can never cast their votes for a sitting President and Vice President in accordance with the Twelfth Amendment. According to plaintiffs’ argument, both the sitting President and Vice President must be “inhabitants” of the District of Columbia.

cast their votes for George W. Bush for president and Richard Cheney for vice president and thus violate the Twelfth Amendment.” Pltfs’ Brief at p. 12. This is clearly inadequate. Even assuming that this type of alleged indirect injury could provide standing for a private cause of action (which it cannot), plaintiffs’ suggestion that it justifies a preliminary injunction ignores the fact that the threatened “injury” will only arise if the allegedly improper votes are counted. Congress is vested with authority to count Electoral votes under the Twelfth Amendment, and it has enacted a comprehensive statutory framework for determining which votes to count as well as the process for receiving and resolving objections to those votes. *See* 3 U.S.C. §§ 15-18. Plaintiffs have not offered any evidence suggesting that Congress will not fulfill its responsibility under the Twelfth Amendment and 3 U.S.C. §§ 15-18. Their allegations of an alleged injury to the “national interest” and to the rights of “all” citizens is hyperbole and sheer speculation; it is wholly inadequate to sustain their burden of proving a substantial threat of irreparable harm.

Further, as discussed above, any attempt to “assert the injury that will be suffered by the non-defendant candidates for President and Vice President” is without precedent where the plaintiff voters have not been precluded from casting their votes for the candidates of their choice. The non-defendant candidates are not parties here and are clearly able to protect their own interests. The plaintiffs have made no showing of a substantial threat of irreparable harm *to them* as required to obtain this extraordinary relief.

III. THE BALANCE OF HARMS AND THE PUBLIC INTEREST REQUIRE THAT PLAINTIFFS’ APPLICATION BE DENIED.

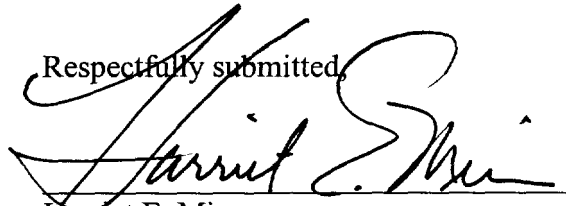
Plaintiffs tender no credible argument that their threatened “injury” outweighs the threatened injury to the defendants if the injunction is granted. The illusive and indirect harm they allege if the Twelfth Amendment is violated is fanciful and speculative at best. By contrast, the resulting harm to the defendants and the public if the Court enjoins the Texas Electors from

voting for Governor Bush and Secretary Cheney is staggering. Such an order would disregard the overwhelming majority vote of the Texas populace, deny those individual voters their right to a meaningful vote and, deny Governor Bush and Secretary Cheney the Texas electoral votes to which they are entitled. Likewise, it would prohibit elected representatives in Congress from determining which votes to count and resolving objections to votes in accordance with the Twelfth Amendment and 3 U.S.C. §§ 15-18. Not only would the defendants be irreparably harmed, but the public interest would be disserved were such an injunction to issue.

WHEREFORE, Governor Bush and Mr. Cheney respectfully request that the plaintiffs' application for a preliminary injunction be denied, that all costs of court be taxed against Plaintiffs, and that Governor Bush and Mr. Cheney receive such other and further relief to which they are justly entitled.

Dated: November 30, 2000.

Respectfully submitted,



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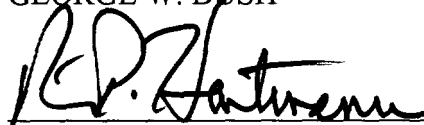
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing pleading was served upon the Plaintiffs' counsel and all other counsel of record via telecopier on this the 30 day of November, 2000.



Stacy L. Brainin